State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
1027 N. Randolph Ave.
Elkins, WV 26241

Earl Ray Tomblin
Governor

Karen L. Bowling
Cabinet Secretary

May 18, 2016

[redacted]

RE: [redacted]
ACTION NO.: 16-BOR-1386

Dear Ms. [redacted]

Enclosed is a copy of the decision resulting from the hearing held in the above-referenced matter.

In arriving at a decision, the State Hearing Officer is governed by the Public Welfare Laws of West Virginia and the rules and regulations established by the Department of Health and Human Resources. These same laws and regulations are used in all cases to assure that all persons are treated alike.

You will find attached an explanation of possible actions you may take if you disagree with the decision reached in this matter.

Sincerely,

Pamela L. Hinzman
State Hearing Officer
Member, State Board of Review

Encl: Resident's Recourse to Hearing Decision
Form IG-BR-29

cc: [redacted], [redacted]

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES
BOARD OF REVIEW

[redacted],

Resident,

v. **Action Number: 16-BOR-1386**

[redacted],

Facility.

DECISION OF STATE HEARING OFFICER

INTRODUCTION

This is the decision of the State Hearing Officer resulting from a fair hearing for [redacted]. This hearing was held in accordance with the provisions found in Chapter 700 of the West Virginia Department of Health and Human Resources' Common Chapters Manual. This fair hearing was convened on April 26, 2016, on an appeal filed March 2, 2016.

The matter before the Hearing Officer arises from the February 24, 2016 decision by the Facility to propose involuntary discharge of the Resident.

At the hearing, the Facility appeared by [redacted], Administrator, [redacted]. Appearing as witnesses for the Facility were [redacted], Licensed Social Worker; [redacted], Director of Nursing; [redacted], Assistant Director of Nursing; and Dr. [redacted], attending physician. The Resident attended the hearing and appeared by [redacted], Esq. Appearing as witnesses for the Resident were [redacted], Resident's daughter; [redacted], Resident's daughter; [redacted], Resident's daughter; and Dr. [redacted], Licensed Psychologist, [redacted].

All witnesses were sworn and the following documents were admitted into evidence.

Nursing Facility's Exhibits:

- NF-1 Timeline of events
- NF-2 30 Day Notice of Discharge dated February 24, 2016
- NF-3 Tobacco Policy Agreement
- NF-4 Progress Notes

Resident's Exhibits:

- R-1 Forensic Interview and Mental Status Examination
- R-1a Resume of Dr. [redacted]
- R-2 Care Plan Focus Summaries
- R-3 Psychological Follow-up
- R-4 Order Summary Reports
- R-5 Order Summary Reports

R-6 Care Plan Focus Summary dated April 7, 2016

After a review of the record, including testimony, exhibits, and stipulations admitted into evidence at the hearing, and after assessing the credibility of all witnesses and weighing the evidence in consideration of the same, the Hearing Officer sets forth the following Findings of Fact.

FINDINGS OF FACT

1) [redacted], hereinafter Facility, provided written notification to the Resident of its intent to initiate involuntary transfer or discharge proceedings on February 24, 2016 (NF-2). The notice advised the Resident that involuntary discharge from the facility was necessary for the patient's welfare and the patient's needs could not be met at the facility. The notice states that the Resident would be transferred to a facility or home where her needs could be met.

2) [redacted], Administrator of the Facility, testified that the Resident was admitted to the Facility for the second time in August 2015, at which time she was informed that the Facility had adopted a no smoking policy. The Resident reportedly agreed at that time to adhere to the policy and signed a Tobacco Policy Agreement (NF-3).

3) The Resident was allegedly found outside the facility smoking with her sister on October 8, 2015 (see Exhibit NF-4), at which time the non-smoking policy was reiterated. At that time, the Facility issued a 30-Day Discharge Notice to the Resident; however, the Resident agreed to refrain from smoking and the Facility retracted the notice.

4) On February 14, 2016, the Resident was suspected of smoking in the front restroom near the lounge area of the Facility. At that time, she indicated that she may have smelled like smoke because she had gone outside with her brother – who is reportedly a heavy smoker - during a recent visit, had kept his cigarette butt in her pocket, but then threw the cigarette butt in the trash.

5) On February 24, 2016, the Resident was found to be smoking in her bathroom. She reportedly admitted to smoking and gave her cigarettes and lighter to a social worker. Another 30-Day Discharge Notice was issued at that time. The Facility offered the Resident a nicotine patch on February 27, 2016, which she reportedly refused. Mr. [redacted] testified that the Resident's action endangered the health of other residents in the facility.

6) On March 5, 2016, a night shift nurse reportedly smelled cigarette smoke coming from the Resident's room, although the Resident had a guest and no smoke was visible. The Resident exhibited increased confusion/behaviors on March 13, 2016, and reportedly began wondering through the Facility asking staff and visitors for cigarettes. At that time,

a blue cigarette lighter was discovered in her room. The Resident also tried to exit the facility several times on March 15, 2016, allegedly searching for cigarettes. The Resident's room was searched on four (4) occasions in late March and April, and no smoking items were found.

7) Mr. [redacted] indicated that the Resident's daughters have cooperated and agreed to put safeguards in place to ensure that their mother does not smoke, including supervising the visits of other relatives. He testified that the Facility did not develop a behavioral plan for the Resident to address the issue in October 2015 because she had been given a 30-day Discharge Notice at that time, and the Facility was assured that no further smoking would occur.

8) [redacted], the Resident's daughter, testified that she lives about one mile from the Facility and visits her mother often. She stated that her mother suffers from Bipolar Disorder and has manic episodes. In addition, she has degenerative arthritis, has had multiple spinal fractures, and is frail. Ms. [redacted] indicated that her mother suffered a mini stroke and has memory problems. Although the Resident has been found to have capacity to make medical decisions, Ms. [redacted] said she questions her mother's competency. She testified that her mother requires constant supervision, and believes that her health would decline if she is moved to another facility away from her family.

9) [redacted], daughter of the Resident, testified that she resides about 3½ miles away from the Facility and visits her mother often. She stated that her mother does not like to leave the Facility, and she is concerned about her mother's mental and physical wellbeing.

10) Dr. [redacted], Licensed Psychologist, completed a Mental Status Examination on the Resident (R-1). He believes the Resident is incapable of fully comprehending rules, and does not think she deliberately disobeys rules or causes disruptions. Dr. [redacted] testified that he believes the Resident is simply falling into old habits, and that a plan could be developed at the Facility to address her specific problematic behaviors. He stated that the smoking problem should be addressed by the Facility, just as other problems with residents – such as physical or verbal aggression – are addressed. Dr. [redacted] contended that the Resident's memory is impaired and it is difficult for her to learn new rules. He testified that the Resident may have competence to make basic decisions such as what she wants to eat, but lacks the competence to make decisions that require her to retain information and weigh options.

11) Dr. [redacted], the Resident's attending physician, testified that an individual's capacity and competency is dynamic, and can change based on his or her state of health. Dr. [redacted] stated that she does not believe the Resident's decision-making ability is currently impaired, although the Resident is impulsive and may need to consult with others before making some decisions.

APPLICABLE POLICY

Medicaid regulations, found in the West Virginia Bureau for Medical Services Provider Manual at §514.9.2, Code of State Regulations 64CSR13, and the Code of Federal Regulations (42 CFR §483.12), provide that transfer and discharge of an individual includes movement of a resident to a bed outside of the Medicaid-certified portion of the facility, whether that bed is in the same physical plant. Transfer and discharge does not refer to movement of a resident to a bed within the Medicaid-certified portion of the facility.

The administrator or designee must permit each resident to remain in the facility, and not be transferred or discharged from the facility unless one of the following conditions is met:

- The transfer or discharge is necessary for the resident's welfare when the needs of the resident cannot be met in the facility; or
- The transfer or discharge is appropriate because the health of the resident has improved sufficiently that the individual no longer meets the medical criteria for nursing facility services; or
- The safety of individuals in the facility is endangered; or
- The health of individuals in the nursing facility would otherwise be endangered; or
- The resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicaid) a stay at the nursing facility, including but not limited to, the amount of money determined by the financial eligibility evaluation as co-payment for the provision of nursing facility services; or
- The facility ceases to operate; or
- The resident is identified by the State and/or Federal certification agency to be in immediate and serious danger.

Documentation must be recorded in the resident's medical record by a physician of the specific reason requiring the transfer or discharge. Discharge documentation is required regardless of the reason for discharge.

Before the nursing facility transfers or discharges a resident, the administrator or designee must notify the resident and/or the responsible party verbally and in writing, in a language that is understandable to the parties, of the intent and reason for transfer or discharge. The same information must be recorded in the resident's medical record and a copy of this written notice must be sent to the State Long-Term Care Ombudsman or his/her designee. Except in the case of immediate danger to the resident and/or others as

documented, the notice of transfer or discharge must be provided at least 30 days prior to the anticipated move to ensure a safe and orderly discharge to a setting appropriate to the individual's needs.

Waiver of this 30-day requirement may be appropriate if the safety of individuals in the facility would be endangered, the immediate transfer is required by the resident's urgent medical needs, or a resident has not resided in the nursing facility for 30 days.

The written notice must include the following:

- The effective date of the transfer or discharge;
- Reason for the discharge;
- The location or person(s) to whom the resident is transferred or discharged;
- A statement that the resident has the right to appeal the action to the State Board of Review, during this time of appeal, the resident/member may choose to stay in the facility;
- The name, address and telephone number of the State long term care ombudsman;
- The mailing address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled and mentally ill individuals.

DISCUSSION

Regulations provide that a nursing facility can involuntarily transfer/discharge an individual if the transfer or discharge is necessary when the needs of the Resident cannot be met in the facility.

The Resident was found to be smoking at the Facility on two occasions – outside on October 8, 2015, and in her room on February 24, 2016. She was suspected to be smoking on two other occasions; however, it should be noted that her brother – who is reportedly a heavy smoker – had been visiting and there is no evidence that the Resident was smoking. Since April 5, 2016, the Resident's room was searched on three occasions and no smoking items were found.

The Resident suffers from mental illness, is reportedly exhibiting increases in confusion/related mental health behaviors, and wanders through the Facility. She was evaluated by a psychologist who believes that her behavior stems from her cognitive impairment and mental illness, and that she has no deliberate plan to break rules.

The Notice of Discharge issued to the Resident indicates that the sole reason for the proposed transfer/discharge is that the Resident's needs cannot be met in the Facility. While it is clear that

the Resident has previously violated the Facility's tobacco use policy, it is likely that her needs can be met with the assistance/supervision of family members and behavior modification procedures.

CONCLUSIONS OF LAW

Evidence fails to demonstrate that the Resident's needs would be unmet in the Facility.

DECISION

It is the decision of the State Hearing Officer to REVERSE the Facility's proposal to discharge the Resident.

ENTERED this _____ Day of May 2016.

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Pamela L. Hinzman
State Hearing Officer